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6 BEFORE THE OFFICE OF THE INSURANCE COMMISSIONER  
7 OF THE STATE OF WASHINGTON

8  
9 In the Matter of the Application regarding the  
10 Conversion and Acquisition of Control of  
11 Premera Blue Cross and its Affiliates.

No. G 02-45

INTERVENERS' RESPONSE TO  
PREMERA'S MOTION TO EXTEND  
CASE SCHEDULE

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13 After Interveners filed their Motion for Emergency Hearing on December 3, 2003,  
14 Premera submitted its Motion to Extend the Case Schedule, which, if granted, would allow the  
15 company to change its conversion proposal, long after the October 15, 2003 deadline for such  
16 amendments had passed.

17 Premera's proposal for a case extension is either too late or too little. Premera failed to  
18 revise its Form A filing before October 15, 2003, despite extensive efforts by the OIC Staff to  
19 work with Premera to revise its Form A filing in compliance with the deadline. Now, after  
20 discovery has closed, and the public hearings and testimony have begun, Premera wants to  
21 change the terms of its proposed conversion, on an inadequate, shortened schedule designed to  
22 preclude adequate review by the public, Interveners and perhaps even the OIC Staff and experts.  
23 Premera's request to change its Form A filing at this late date should be denied. However, if

1 Premera is permitted to file a revised Form A, rather than begin the process anew, the resulting  
2 case schedule must permit adequate discovery and public process.

### 3 BACKGROUND INFORMATION

4 Since at least February, 2003, Premera has known of the concerns of the OIC Staff and  
5 their experts regarding the proposed Form A. Declaration of James T. Odiorne, dated October  
6 21, 2003 at 3. The OIC Staff offered assistance to Premera to revise its Form A. Id. However,  
7 Premera did not respond to the OIC Staff's offer. Id. Premera made no effort to revise its Form  
8 A filing.<sup>1</sup> All parties, even Premera, contemplated that there would be a point in the case  
9 schedule process whereby Premera would amend its Form A. See Premera's Motion to Modify  
10 Case Schedule Order, dated July 14, 2003 (Motion includes a deadline proposed by Premera by  
11 which it would amend its Form A, before the parties' expert reports were finalized, and before  
12 close of discovery). After the Insurance Commissioner issued his Thirteenth Order, Premera did  
13 not appeal or request an extension of the October 15, 2003 deadline for amending its Form A,  
14 and that deadline became the law of the case.

15 Premera did not amend its Form A filing by October 15, 2003, as required. Instead,  
16 Premera requested that the OIC Staff negotiate privately to identify "conditions" which would be  
17 jointly presented to the Insurance Commissioner. See Declaration of James T. Odiorne dated  
18 October 21, 2003 and attachments. The OIC Staff objected, both because such negotiations  
19 would take the process out of the public view and give the appearance of a "back room process"  
20 and because the necessary changes could not be addressed as "conditions" to the Form A. Id.

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22 <sup>1</sup> As noted in the Declaration of James T. Odiorne, these kinds of negotiations between OIC Staff and a company  
23 filing a Form A usually occur "early in the process." Declaration of James T. Odiorne dated October 21, 2003 at 3.

1 As Mr. Odiorne stated to Premera in an email dated October 14, 2003, "...I cannot imagine how  
2 the OIC Staff can recommend to the Commissioner that the application be approved without  
3 *significant and substantial* amendment of the Form A." (Emphasis added).

4 Premera's efforts to seek last-minute "conditions" under RCW 48.31C.030(5)(a)(ii)(C)  
5 should have been halted by the Insurance Commissioner's Seventeenth and Eighteenth Orders.  
6 The Insurance Commissioner specifically held in his Eighteenth Order that "...[he] will consider  
7 the terms of the transaction as described in the Form A submitted by Premera as of October 15,  
8 2003, which was the deadline for filing amendments."

9 The Interveners relied upon the Seventeenth and Eighteenth Orders, and have moved  
10 forward with the expectation that the present Form A would be the subject of the administrative  
11 proceeding. During that time, the Interveners have expended considerable time, effort and  
12 resources to finalize their expert reports, participate in discovery proceedings, participated in the  
13 public hearings already convened in Spokane and Yakima, as well as prepare for the public  
14 hearings in Seattle and Bellingham and the public hearing in Tacoma on January 15, 2003.

15 Now, upon the close of discovery under the current Form A, Premera proposes a case  
16 schedule extension and a new deadline for filing a revised Form A. See Premera's Motion to  
17 Extend Case Schedule Including Upcoming Deadlines and Hearing Date. Strikingly, even now,  
18 despite the Seventeenth and Eighteenth Orders, Premera does not commit to filing a revised  
19 Form A. Id. at 2, Ftnte 2; 3. The proposed schedule does not provide for any public hearings on  
20 the revised conversion proposal, nor does it include any time for additional discovery based upon  
21 the unknown revisions that will be sought by the company. Id. at 3. Id. The proposal would  
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1 even exclude Interveners from the anticipated negotiations between Premera and the OIC Staff,  
2 merely providing undefined “oral briefings” to the Interveners about the discussions. Id.

### 3 **ARGUMENT**

#### 4 **1. Any changes to Premera’s conversion proposal at this late date should be** 5 **considered a new Form A filing, requiring a new review proceeding under the** 6 **Holding Company Acts.**

7 Premera seeks a “hiatus” in the current case schedule for the purpose of negotiating  
8 exclusively with the OIC Staff about the proposed conversion “transaction terms, post-  
9 conversion market behavior, and IPO structure.” Premera’s Motion to Extend Case Schedule at  
10 1-2. Premera fails to commit to filing a revised Form A, nor does it agree that it will not seek  
11 “conditions” under RCW 48.31C.030(5)(a)(ii)(C) as an alternative to filing a revised Form A.  
12 Id. at 2-3. Premera and the OIC Staff have not come to agreement regarding the proposed  
13 changes, so the extent of the possible revisions to the Form A are currently unknown. However,  
14 based upon the statement by Deputy Commissioner James Odiorne, the revisions would have to  
15 be “significant and substantial” in order to address the concerns raised by the OIC Staff and their  
16 experts.

17 It is simply too late in the current proceeding for Premera to file a revised Form A,  
18 particularly one that is significantly and substantially different from the current proposal. As  
19 Premera itself noted earlier in the process, the parties should work together to meet the deadlines  
20 established, before seeking to alter them. See Premera’s Response to Interveners’ Motion for  
21 Reconsideration of Thirteenth Order at 1. But Premera refused efforts by the OIC Staff to work  
22 with them to revise its Form A in a timely manner. Premera should not be permitted now, after  
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1 the parties have moved forward based upon the passage of the October 15, 2003 deadline, to  
2 change its proposal.

3 The OIC Staff do not object to Premera's efforts to delay the case schedule. See OIC  
4 Staff's Response to Premera's Motion to Extend Case Schedule. However, even between the  
5 Premera's Motion and the OIC Staff's response, there appears disagreement regarding the  
6 outcome of the negotiations they seek to pursue. The OIC Staff maintain that "Premera may file  
7 amendment to its Form A as the outcome of these discussions." Id at 2. However, Premera  
8 makes no such commitment in its Motion, leaving open the possibility that Premera may  
9 continue to withhold the complete actual terms of its conversion proposal, and try to submit such  
10 terms as "conditions" late in the hearing process.

11 Interveners believe that the OIC Staff have been exceedingly accommodating to  
12 Premera's demands. However, there must come a point in the process where due process,  
13 fairness and transparency demand that Premera put on the table the full, specific terms of the  
14 conversion transaction, and allow the public review of its proposal to begin. That point came in  
15 this proceeding on October 15, 2003, as the Commissioner has ordered.

16 The OIC Staff argues that it is typical in a proceeding under the Holding Company Acts  
17 for the OIC Staff and the company to have negotiations even up to the start of an administrative  
18 hearing. OIC Response to Premera's Motion to Extend Case Schedule at 1-2. However, Deputy  
19 Commissioner James T. Odiorne stated in his October 21, 2003 declaration, that such  
20 negotiations usually occur "early in the process." In this case, it is simply too late. The  
21 administrative proceeding has begun, since public testimony that will be considered as part of the  
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1 record has been gathered at the hearings in Spokane and Yakima. See Sixteenth Order, citing to  
2 RCW 34.05.452.

3       Regardless of when negotiations cease under the OIC Staff's customary practices,  
4 Premera's proposed conversion cannot be considered typical or customary. This huge proposed  
5 transaction is the first health insurance conversion in Washington State, and will involve access  
6 to health care for hundreds of thousands of individuals. The significant impact of the conversion  
7 on the public requires that the full, specific terms of the proposed conversion be available for  
8 public review, and that no closed-door negotiations occur. Interveners could not agree more with  
9 the Insurance Commissioner's Order that "...the nature of this matter requires the greatest  
10 possible transparency to the public and any appearance to the contrary raises serious concerns."  
11 Insurance Commissioner's Twenty-First Order. Private negotiations should not be permitted  
12 where any new proposal may have immense consequences for the public and our health care  
13 system.

14       **2. If Premera is allowed to change the terms of its conversion proposal, it must be**  
15       **required to submit a revised Form A filing, and the case schedule must provide**  
16       **for adequate discovery and public review of the new proposal.**

17       Premera's proposed case schedule is simply too short to adequately ensure due process  
18 and fairness to all parties. Premera seeks a case schedule extension of only 63 days, during  
19 which time the company will privately negotiate with the OIC Staff, possibly, but not  
20 necessarily, submit a new Form A, and then allow a scant three weeks for all the parties to  
21 submit additional expert testimony. Premera's Motion to Extend Case Schedule at 3. The  
22 proposed timeline does not include any additional discovery nor any time for public hearings on  
23 the revised filing.

1 New public hearings and additional discovery on the revised Form A filing and any  
2 supplemental expert reports will be essential to ensure due process and fairness. All parties have  
3 a right to conduct discovery. RCW 48.31C.030(4). Since the terms of the proposed conversion  
4 will very likely be significantly changed as a result of the new case schedule, limited discovery  
5 must be allowed.<sup>2</sup> Interveners propose that limited discovery related to only the revised Form A,  
6 any supplemental reports be issued by experts retained by the OIC Staff, ADI Staff, Premera and  
7 the Intervener groups and any new fact witnesses must be included in the schedule.<sup>3</sup>

8 Interveners suggest that the Insurance Commissioner consider restarting the timelines  
9 after October 15, 2003 that are described in his Thirteenth Order, from January 8, 2004. Since  
10 Premera seeks additional time for its own benefit, it should not object to a timeline it considered  
11 appropriate in the past. The Interveners' proposed timeline would allow adequate participation  
12 by the Interveners, the OIC Staff and the public.

13 The Interveners' proposed case schedule is as follows:

14 January 8, 2004	Deadline for Premera to file amendments or revisions to its 15 Form A with the OIC and all parties. <sup>4</sup> Public copies of the amendments to be immediately available.
16 February 3, 2004	Deadline for OIC Staff to submit supplemental Expert 17 Reports to all parties. <sup>5</sup> Public copies of the supplemental Expert Reports to be immediately available.

19 <sup>2</sup> Interveners do not support re-opening the current discovery cut-off but instead suggest limited discovery based  
20 upon the changes that may be proposed by Premera.

21 <sup>3</sup> Premera may argue that no additional discovery is necessary since Interveners have already had the opportunity to  
22 participate in a discovery process. However, Interveners' discovery needs at this time are informed by the strong  
23 stance of the OIC Experts in opposition to approval of the current Form A. Should the OIC Experts change their  
positions as a result of Premera's revised Form A filing, Interveners' discovery needs will similarly change.

<sup>4</sup> Interveners define "parties" to refer to the OIC Staff, Premera and all Interveners' groups.

<sup>5</sup> Interveners propose the inclusion of the three weeks and three additional business days mentioned in the OIC Staff  
Response at 2.

1	February 17, 2004	Deadline for Premera and Interveners to submit
2		supplemental Expert reports to all parties; Public copies of
3		the supplemental Expert Reports to be immediately
4		available. Deadline for all parties to disclose any additional
5		expert witnesses
6	February 23-March 8, 2004	Public hearings on Premera conversion <sup>6</sup>
7	February 24, 2004	Deadline for all parties to disclose additional Fact
8		Witnesses
9	March 16, 2004	Deadline for all parties for supplemental discovery and
10		limited depositions of experts.
11	March 30, 2004	Deadline for all parties to submit pre-filed testimony
12	April 13, 2004	Deadline for all parties to submit pre-filed responsive
13		testimony
14	April 23-May 7, 2004	Hearing Dates
15	May 17, 2004	Deadline for Post-Hearing submissions
16	June 21, 2004	Commissioner's Decision

Interveners' proposed schedule would result in the Commissioner's decision on June 21, 2004, only five weeks later than Premera's proposed end date of May 17, 2004. While Interveners understand that Premera would prefer a more limited timeframe, such a shortened schedule should be rejected. Interveners urge the Insurance Commissioner to ensure that all parties, including the Interveners, are able to participate fully in the administrative proceeding on any revised Form A filing that is submitted.

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<sup>6</sup> At the very least, if Premera is permitted to delay the hearing process and revise its Form A filing, the public hearings in Seattle and Bellingham, currently scheduled for December 11 and 16, 2003, respectively, should be postponed. Additionally, the hearings in Spokane and Yakima should be reconvened to allow testimony on the revised Form A.



1 Premera will not be prejudiced by the Interveners' proposed schedule. Premera itself  
2 seeks additional time to revise its Form A filing. Without this accommodation, Premera would be  
3 required to either move forward with its current Form A filing, in the face of the OIC Staff  
4 concerns and Interveners' objections, or bear the time and expense of filing a completely new  
5 Form A.

6 **3. Interveners should be involved in negotiations between Premera and the OIC**  
7 **Staff.**

8 Premera and the OIC Staff propose to negotiate regarding the company's revision to the  
9 Form A in private. Interveners seek to participate in any negotiations regarding revisions to  
10 Premera's Form A filing. Interveners will not impair the negotiations between the parties, nor  
11 inhibit the OIC Staff's activities. Interveners have been efficient participants in the proceeding  
12 thus far, and should be permitted to continue to participate fully.

13 Without Interveners' participation, the proposed negotiations could result in Premera and  
14 the OIC Staff agreeing on the terms of the proposed conversion, leaving the Interveners unable to  
15 protect their significant interests. It is this very type of "back-room process" that should be  
16 prohibited. The offer by Premera to provide undefined "briefings" to the Interveners does not  
17 address the fundamental unfairness of what appears to be settlement negotiations between two  
18 out of the six parties to this administrative proceeding. If any negotiations are to occur, it should  
19 occur between all parties, including the Intervener groups.

20 **CONCLUSION**

21 Interveners request that the Insurance Commissioner deny Premera's Motion to Extend  
22 the Case Schedule, and order that Premera's Form A Filing as of October 15, 2003 will be the  
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1 terms of the transaction considered in this proceeding, and it cannot be amended, revised or  
2 otherwise “conditioned” by Premera.

3 Alternatively, if Premera’s Motion to Extend the Case Schedule is permitted, Interveners  
4 request that the Insurance Commissioner order Premera to submit a revised Form A filing,  
5 prohibit Premera from proposing “conditions” at any time after January 8, 2004, and adopt the  
6 above case schedule, which includes the opportunity for adequate public disclosure, limited  
7 discovery and depositions and additional public hearings.

8 Interveners also request that the Insurance Commissioner order the full participation of  
9 all Interveners’ groups in any ongoing negotiations between Premera and the OIC Staff  
10 regarding revisions to the Form A filing.

11 Dated this 8<sup>th</sup> day of December, 2003.

12  
13 COLUMBIA LEGAL SERVICES  
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16  
17 Eleanor Hamburger, WSBA # 26478  
Attorney for Welfare Rights Organizing  
Coalition

18 on behalf of all Intervener Groups.  
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